

UNITED STATES GOVERNMENT

RAILROAD RETIREMENT BOARD

JUN 7 1989

Memorandum

L-89-63

TO : Director of Compensation and Certification

FROM : Deputy General Counsel

SUBJECT: Staten Island Rapid Transit Operating Authority
Employer Status

This is to notify you that pursuant to a request by Mr. Albert C. Cosenza, Vice President and General Counsel of the Staten Island Rapid Transit Operating Authority (SIRTOA), I have determined that SIRTOA ceased to be an employer under the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA) effective September 21, 1987. SIRTOA has previously been ruled to be an employer under the Acts with service creditable from July 1, 1971. See Legal Opinion L-71-177.

The evidence in file shows that in 1970 the City of New York purchased from the Staten Island Rapid Transit Railway Company (Railway Company), a subsidiary of the Baltimore & Ohio Railroad, a 14.5 mile length of track on Staten Island, New York, stretching from St. George to Tottenville. The City intended to conduct commuter rail service over the line. The Railway Company retained another 16.7 miles of track on Staten Island, and obtained from the City freight service trackage rights over the St. George - Tottenville line. Freight service was estimated at the time to be 7,000 cars annually. The City agreed to maintain the line for the joint use of commuter and freight service.

The Metropolitan Transportation Authority (MTA) of New York City formed SIRTOA as an instrumentality to operate the line. SIRTOA requested a determination as to its status as an employer under the RRA and RUIA. On June 8, 1971, the General Counsel of the Board ruled in Legal Opinion L-71-177 that SIRTOA was an employer under the Acts from the date operations began. The General Counsel found that as the MTA also controlled the Long Island Railroad Company (a rail carrier employer covered by the Acts), and as SIRTOA performed various services for the Railway Company under its trackage agreement, SIRTOA fell within the provision which covers companies under common control with a rail carrier and which provide a service in connection with railroad transportation. When SIRTOA did not challenge this decision, it became a final determination under the regulations.

Following the 1971 decision of the General Counsel, several forums have adjudicated questions relating to operation of the St. George - Tottenville line. Factual findings in these cases provide information as to subsequent events.

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In 1979, the Interstate Commerce Commission found that demand for freight service over the line declined from the 7,000 per annum noted earlier to one five-car train per day, five days per week. Brotherhood of Locomotive Engineers, Et Al., v. Staten Island Rapid Transit Operating Authority, 360 ICC 464, at 470. In Hedderman v. Staten Island Rapid Transit Operating Authority, 593 F. Supp. 1141 (E.D. N.Y, 1984), at 1143, the court noted one or two trains of three or four cars operated over the line per month.

Subsequently, the United States Court of Appeals for the Second Circuit, in an opinion upholding an ICC decision regarding labor protective measures, noted that declining demand caused the Railway Company to request ICC approval to abandon all operations. Railway Labor Executives' Association v. United States, 791 F. 2d 994, (C.A. 2, 1986), at 995. Ultimately, on April 19, 1985, the ICC authorized Railway Company to both sell the 16 mile track segment it owned outright and to assign freight service rights over SIRTOA's line to a new operator. Id., at 997. The purchaser, the Staten Island Railway Corporation (Railway Corporation), was a subsidiary of the New York, Susquehanna & Western Railway Corporation. Id., at 1002-1006.

The new operator, Railway Corporation, together with SIRTOA, then petitioned the ICC to abandon freight service only over SIRTOA's line. The ICC granted the request effective June 2, 1986. Staten Island Rapid Transit Operating Authority - Abandonment Exemption - Staten Island Railway Corporation - Discontinuance of Service Exemption, Docket Nos. AB-261X, AB-263X, May 1, 1986. In reaching its decision, the ICC noted that traffic was reduced to 68 cars during 1984; that only one shipper remained along the St. George - Tottenville line; and that the sole remaining shipper had expressed no interest in continued freight service over the line. The ICC explicitly determined that "Here SIRTOA is abandoning all of its freight operations and, as a result, will no longer be subject to our jurisdiction."

SIRTOA had previously been held subject to the Railway Labor Act (RLA). Staten Island Rapid Transit Operating Authority v. ICC, 718 F. 2d 533 (C.A. 2, 1983). Following approval of abandonment of freight service, and actual cessation of freight service over the Tottenville line on July 11, 1986 (per ICC Finance Docket 30879, infra), SIRTOA petitioned the ICC for a ruling that it was no longer a carrier for purposes of that Act. The ICC responded with a declaratory order on September 21, 1987. Staten Island Rapid Transit Operating Authority - Petition for Declaratory Order, Finance Docket No. 30879.

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The ICC emphasized the declaratory, rather than regulatory, nature of its decision. "The finding we are making * * * is limited to the issue of whether the definition in [Railway Labor Act] section 1, First, as limited by the electric railway proviso, applies to SIRTOA". The ICC later noted "While the NMB [National Mediation Board] will not consider itself bound * * *, it may defer to our expertise." Moreover, the ICC explicitly declined to "determine here the broader question of whether SIRTOA is otherwise subject to the RLA."

Within these limitations, the ICC made three findings. First, it held that abandonment of freight operations over the St. George - Tottenville line (which SIRTOA stated took place July 11, 1986) ended SIRTOA's latent common carrier obligation to provide freight service, and hence it no longer met the primary definition of carrier. Second, while SIRTOA remained under common control with the Long Island Railroad (a rail carrier subject to the RLA), cessation of freight operations over SIRTOA's line terminated any service SIRTOA performed in connection with railroad transportation within the meaning of the RLA. Finally, the ICC found that, notwithstanding the foregoing, the lack of any freight movement over the line meant SIRTOA became an interurban electric railway not operated as a part of a "general steam-railroad system of transportation". The ICC decision was later affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in Railway Labor Executives' Association v. Interstate Commerce Commission, 859 F. 2d 996 (October 25, 1988).

Following the September 1987 ICC order, the Railway Labor Executives' Association and other labor organizations filed suit in the U.S. District Court to request a declaratory order that SIRTOA was otherwise subject to the RLA and the Federal Employers' Liability Act (FELA). SIRTOA in turn requested the Court to find it not in any respect subject to the RLA; further, that SIRTOA effective May 1, 1986, was not a rail carrier in interstate commerce and that after that date was not liable under the FELA. The District Court rendered an unpublished decision in favor of SIRTOA on November 22, 1988. Railway Labor Executives' Association v. Staten Island Rapid Transit Authority, No. CV 87-3831 (E.D. N.Y., November 22, 1988).

The District Court found the ICC, rather than the Court, had jurisdiction to determine SIRTOA's status as a rail carrier. Slip op., at 13. The Court further determined SIRTOA not to be a "commuter authority" subject to Title V of the Rail Passenger Service Act, and hence not subject to the RLA by reason of section 511 of the former Act (45 U.S.C. § 591). Id., at 16.

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Similarly, the Court found that SIRTOA was not a "local public body" subject to ICC jurisdiction by reason of 49 U.S.C. § 10504. Id., at 17. Finally, the Court also disagreed with the RLEA's argument that SIRTOA was bound to remain under the RLA by the 1970 operating agreement between the City of New York and Railway Company.

The Railroad Retirement Board was never made a party to any of the foregoing litigation. Moreover, SIRTOA never otherwise contacted the Board regarding its continued status as a covered employer under the RRA and RUIA, and in fact continued to file returns of service and compensation and contributions under the RUIA as required during this time.^{1/} I initiated this inquiry in response to a letter from Mr. Albert C. Cosenza, Vice President and General Counsel of SIRTOA, dated February 21, 1989. In his letter, Mr. Cosenza alleges that SIRTOA's status as a covered employer terminated with the date of the ICC decision regarding the electric railway proviso of the RLA, September 21, 1987, and requests that returns of compensation under the RRA be corrected to show no service after that date. He also requests refund of all contributions under the RUIA subsequent to September 1987.

Section 1(a) of the RRA (45 U.S.C. § 231(a)) provides in pertinent part that:

"SECTION 1. For the Purposes of this Act--

(a)(1) The term 'employer' shall include--

"(i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;

"(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking

^{1/} I note that on March 29, 1989, SIRTOA filed 1988 returns of compensation under the RRA showing service through December 1988, but paid contributions under the RUIA through the third quarter of 1988 (September 30, 1988).

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service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *;"

"(2) Notwithstanding the provisions of subdivision (1) of this subsection, the term 'employer' shall not include--

"(ii) any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general diesel-railroad system of transportation, but shall not exclude any part of the general diesel-railroad system of transportation now or hereafter operated by any other motive power. * * *"

Sections 1(a) and (1)(b) of the RUIA contain essentially identical definitions.

In addition, regulations of the Board provide that employer status under the Acts terminates when the company loses any characteristics essential to the existence of an employer status. 20 CFR 202.11. Status terminates on the date upon which final or complete cessation of an essential characteristic occurs. 20 CFR 202.12(b). However, employer status is presumed to continue in absence of evidence to the contrary (20 CFR 202.12), and employers are under a duty to "promptly notify the Board" of changes in operations which affect status as an employer (20 CFR 209.3(a)).

Legal Opinion L-71-177 held SIRTOA to be a covered employer by reason of being under common control with a rail carrier employer and performing a service in connection with railroad transportation. The ICC, in Staten Island Rapid Transit Operating Authority, Finance Docket No. 30879, addressed a similar provision of the RLA. See section 1, First, of that Act (45 U.S.C. 151, First). It found that the MTA continued to control both the Long Island Railroad and SIRTOA, and hence met the first criterion of that provision. As the Long Island Railroad is a rail carrier employer under the Acts, it is therefore clear that SIRTOA also satisfies the common control provision of the Acts administered by the Board.

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In L-71-177, the General Counsel found that SIRTOA performed various services for the Railway Company under its trackage agreement. However, as a consequence of abandonment of freight service over the St. George - Tottenville line on July 11, 1986, SIRTOA no longer performed track maintenance and other services in connection with the rail carrier service of the freight operator (Railway Corporation). From that date onward, it is my opinion that SIRTOA no longer met the definition of carrier affiliate employer which formed the basis for the original determination that it was a covered employer under the Acts.

It remains to determine whether SIRTOA's status continued under some other definition of employer. Among the remaining definitions of employer under the Acts, only the first, relating to rail carriers, conceivably could apply to SIRTOA.

As noted above, both the RRA and RUIA except from covered rail carrier employers electric railways not operated as part of a general diesel-powered railroad system. The language of these provisos is substantially the same as that of the RLA considered by the ICC in its September 21, 1987 Finance Docket decision. Cases decided by the ICC consider the electric railway provisos of the three Acts to have similar purposes. See, e.g., Indiana Railroad, 229 I.C.C. 48, (1938); Oklahoma Railway Co., 238 I.C.C. 235 (1940). While the Railroad Retirement Board is no more bound by the ICC decision than is the National Mediation Board (Finance Docket 30879, supra), the finding by the ICC, if consistent with standards of these earlier cases, is a persuasive interpretation of law relevant to my decision.

I find that the September 1987 ICC decision with respect to the RLA is indeed consistent with standards developed in earlier cases. Principal considerations are freight service and trunk line connections. Oklahoma Railway, supra. Effective July 11, 1986, no freight service may be conducted over the line in question because the designated operator abandoned service, and no other operator could do so without ICC approval. Finance Docket 30879, supra. The ICC further ruled that SIRTOA's passenger operations, lacking interline service beyond Staten Island or sales of tickets beyond its system, did not constitute operations subject to ICC jurisdiction. Mere retention of physical connections with interstate trunk lines is insufficient. The ICC therefore applied the appropriate rules of law to determine that SIRTOA met the definition of an exempt electric railway under the RLA.

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As noted above, the electric railway provisos of the three Acts have been interpreted together. I can see no basis for distinguishing the Acts administered by the Board in this case. Further, prior opinions of this office have applied the electric railway provisos of the Acts in a manner consistent with the conclusion of the ICC. See, e.g., Benton and Fairfield Railway Co., L-42-340, and West Penn Railways Co., L-43-59. Compare: Sandusky, Norwalk and Mansfield Electric Railway, L-43-108. In accordance with section 202.13 of the Board's regulations, I therefore find SIRTOA not to be more than an interurban electric railway; not to be part of the general rail system of transportation; and not to be part of a general diesel system of rail transportation.^{2/}

The date of termination of SIRTOA's status remains to be decided. Section 202.12(b) of the regulations lists illustrations of events to be considered in fixing a date of termination of employer status. Events which could qualify as determinative include both cessation of business and the effective date of relevant judicial action. It might be argued that SIRTOA lost the essential characteristic of its status on May 1, 1986, the date the ICC approved abandonment of freight service on the Tottenville line, or on July 11, 1986, when Railway Corporation actually abandoned freight service over the line and SIRTOA'S obligations relating to freight service consequently expired. However, Mr. Cosenza requests termination of status as of September 21, 1987, the date of the ICC ruling regarding the electric railway proviso, and it is my opinion that this is indeed the date on which SIRTOA's employer status terminated.

Although the May 1, 1986 ICC decision in Docket Nos. AB-261X and AB-263X approved abandonment of freight operations, it did not directly address the question as to SIRTOA's continued status as an electric railway, not exempt by the provisos of the RLA, RRA, and RUIA. Moreover, SIRTOA apparently did not believe the May 1986 ICC decision to be conclusive as to its continued status as an employer under the Acts, because it did not notify the Board of the decision and continued to file returns of compensation under the RRA and employer contributions under the RUIA. The same reasoning applies with respect to the date that freight service over SIRTOA's line actually terminated, July 11, 1986.

^{2/} As this memorandum finds SIRTOA not to be an employer under the Acts, approval of this decision by the Board as specified by 202.13(b) is not required.

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The September 21, 1987 declaratory order of the ICC in Finance Docket 30879 specifically addressed SIRTOA's continued status as an electric railway subject to the provisions of the RLA. The Court of Appeals for the District of Columbia Circuit upheld the 1987 order on October 25, 1988. Railway Labor Executives' Association, supra. Further, as discussed above, the ICC order accords with similar decisions concerning the electric railway provisos of the RRA and RUIA. Finally, SIRTOA has contacted the Board regarding the decision within a reasonable time following the date of the Court of Appeals decision which established the finality of the 1987 ICC order.

It is therefore my opinion that SIRTOA ceased to be an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act effective with the close of business on the date the ICC determined SIRTOA to be exempt under the electric railway proviso of the Railway Labor Act, September 21, 1987. Service performed after that date should not be credited toward benefits under the Acts, and compensation paid after that date should not be subject to assessment for contributions under the Railroad Unemployment Insurance Act.

An appropriate Form G-215 is attached.


Steven A. Bartholow

Attachment

cc: Chief Financial Officer